

James Madison, September, 1829. Notes in Outline, Federal and State Government. Transcription: The Writings of James Madison, ed. Gaillard Hunt. New York: G.P. Putnam's Sons, 1900-1910.

OUTLINE. MAD. MSS.

Sepr. 1829.

The compound Govt of the U. S. is without a model, and to be explained by itself, not by similitudes or analogies. The terms Union, Federal, National not to be applied to it without the qualifications peculiar to the system. The English Govt is in a great measure *sui generis*, and the terms Monarchy used by those who look at the executive head only, and Commonwealth, by those looking at the representative member chiefly, are inapplicable in a strict sense.

A fundamental error lies in supposing the State Governments to be the parties to the Constitutional compact from which the Govt. of the U. S. results.

It is a like error that makes the General Govt. and the State governments the parties to the compact, as stated in the 4th. letter of "Algernon Sidney," [Judge Roane]. They may be parties in a judicial controversy, but are not so in relation to the original constitutional compact.

In No. XI of "Retrospects," [by Govr. Giles], in the Richmond Enquirer of Sept. 8, 1829, Mr. Jefferson is misconstrued, or rather *mistated*, as making the State Govts. & the Govt of the U. S. *foreign* to each other; the evident meaning, or rather the express language of Mr. J, being "the *States* are foreign to each other, in the portions of sovereignty not granted, as

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they were in the entire sovereignty before the grant,” and not that the State Govts. and the Govt. of the U. S. are foreign to each other. As the State Govts. participate in appointing the Functionaries of the Genl. Govt. it can no more be said that they are altogether foreign to each other, than that the people of a State & its Govt. are foreign.

The real parties to the constl. compact of the U. S. are the *States* —that is, the people thereof respectively in their sovereign character, and they *alone* , so declared in the Resolutions of 98, and so explained in the Report of 99. In these Resolutions as originally proposed, the word *alone* , wch. guarded agst. error on this point, was struck out, [see printed debates of 98] and led to misconceptions & misreasonings concerning the true character of the pol: system, and to the idea that it was a compact between the Govts. of the States and the Govt. of the U. S. an idea promoted by the familiar one applied to Govts. independent of the people, particularly the British, of [?] a compact between the monarch & his subjects, pledging protection on one side & allegiance on the other.

The plain fact of the case is that the Constitution of the U. S. was created by the people composing the respective States, who alone had the right; that they organized the Govt. into Legis. Ex. & Judiciary. delegating thereto certain portions of power to be exercised over the whole, and reserving the other portions to themselves respectively. As these distinct portions of power were to be exercised by the General Govt. & by the State Govts; by each within limited spheres; and as of course controversies concerning the boundaries of their power wd happen, it was provided that they should be decided by the Supreme Court of the U. S. so constituted as to be as impartial as it could be made by the mode of appointment & responsibility for the Judges.

Is there then no remedy for usurpations in which the Supreme Ct. of the U. S. concur? Yes: constitutional remedies such as have been found effectual; particularly in the case of alien & sedition laws, and such as will in all cases be effectual, whilst the responsibility of the Genl. Govt to its constituents continues:—Remonstrances & instructions—recurring

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elections & impeachments; amendt. of Const. as provided by itself & exemplified in the 11th article limiting the suability of the States.

These are resources of the States agst. the Genl. Govt.: resulting from the relations of the States to that Govt.: whilst no corresponding controul exists in the relations of the Genl. to the individual Govts. all of whose functionaries are independent of the United States in their appt. and responsibility.

Finally should all the constitutional remedies fail, and the usurpations of the Genl. Govt. become so intolerable as absolutely to forbid a longer passive obedience & non-resistance, a resort to the original rights of the parties becomes justifiable; and redress may be sought by shaking off the yoke, as of right, might be done by part of an individual State in a like case; or even by a single citizen, could he effect it, if deprived of rights absolutely essential to his safety & happiness. In the defect of their ability to resist, the individual citizen may seek relief in expatriation or voluntary exile¹ a resort not within the reach of large portions of the community.

¹ See letter to N. P. Trist; and see also the distinction between an expatriating individual withdrawing only his person and moveable effects, and the withdrawal of a State mutilating the domain of the Union.— *Madison's Note*.

The Virginia Expatriation Act was that of October, 1783, Sec. III. Hening's *Stats. at Large*, XI, 325. The letter to Trist was dated February 15, 1830.

It has been too much the case in expounding the Constitution of the U. S. that its meaning has been sought not in its peculiar and unprecedented modifications of Power; but by viewing it, some through the medium of a simple Govt. others thro' that of a mere League of Govts. It is neither the one nor the other; but essentially different from both. It must consequently be its own interpreter. No other Government can furnish a key to its true character. Other Governments present an individual & indivisible sovereignty. The Constitution of the U. S. divides the sovereignty; the portions surrendered by the States,

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composing the Federal sovereignty over specified subjects; the portions retained forming the sovereignty of each over the residuary subjects within its sphere. If sovereignty cannot be thus divided, the Political System of the United States is a chimæra, mocking the vain pretensions of human wisdom. If it can be so divided, the system ought to have a fair opportunity of fulfilling the wishes & expectations which cling to the experiment.

Nothing can be more clear than that the Constitution of the U. S. has created a Government, in as strict a sense of the term, as the Governments of the States created by their respective Constitutions. The Federal Govt. has like the State govts. its Legislative, its Executive & its Judiciary Departments. It has, like them, acknowledged cases in which the powers of these departments are to operate. And the operation is to be directly on persons & things in the one Govt. as in the others. If in some cases, the jurisdiction is concurrent as it is in others exclusive, this is one of the features constituting the peculiarity of the system.

In forming this compound scheme of Government it was impossible to lose sight of the question, what was to be done in the event of controversies which could not fail to occur, concerning the partition line, between the powers belonging to the Federal and to the State Govts. That some provision ought to be made, was as obvious and as essential, as the task itself was difficult and delicate.

That the final decision of such controversies, if left to each of the 13 now 24 members of the Union, must produce a different Constitution & different laws in the States was certain; and that such differences must be destructive of the common Govt. & of the Union itself, was equally certain. The decision of questions between the common agents of the whole & of the parts, could only proceed from the whole, that is from a collective not a separate authority of the parts.

The question then presenting itself could only relate to the least objectionable mode of providing for such occurrences, under the collective authority.

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The provision immediately and ordinarily relied on, is manifestly the Supreme Court of the U. S., clothed as it is, with a Jurisdiction “in controversies to which the U. S. shall be a party;” the Court itself being so constituted as to render it independent & impartial in its decisions; [see Federalist, No. 39, p. 241] whilst other and ulterior resorts would remain in the elective process, in the hands of the people themselves the joint constituents of the parties; and in the provision made by the Constitution for amending itself. All other resorts are extra & ultra constitutional, corresponding to the Ultima Ratio of nations renouncing the ordinary relations of peace.

If the Supreme Court of the U. S. be found or deemed not sufficiently independent and impartial for the trust committed to it, a better Tribunal is a desideratum: But whatever this may be, it must necessarily derive its authority from the whole not from the parts, from the States in some collective not individual capacity. And as some such Tribunal is a vital element, a sine qua non, in an efficient & permanent Govt. the Tribunal existing must be acquiesced in, until a better or more satisfactory one can be substituted.

Altho' the old idea of a compact between the Govt. & the people be justly exploded, the idea of a compact among those who are parties to a Govt. is a fundamental principle of free Govt.

The original compact is the one implied or presumed, but nowhere reduced to writing, by which a people agree to form one society. The next is a compact, here for the first time reduced to writing, by which the people in their social state agree to a Govt. over them. These two compacts may be considered as blended in the Constitution of the U. S., which recognises a union or society of States, and makes it the basis of the Govt. formed by the parties to it.

It is the nature & essence of a compact that it is equally obligatory on the parties to it, and of course that no one of them can be liberated therefrom without the consent of the

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others, or such a violation or abuse of it by the others, as will amount to a dissolution of the compact.

Applying this view of the subject to a single community, it results, that the compact being between the individuals composing it, no individual or set of individuals can at pleasure, break off and set up for themselves, without such a violation of the compact as absolves them from its obligations. It follows at the same time that, in the event of such a violation, the suffering party rather than longer yield a passive obedience may justly shake off the yoke, and can only be restrained from the attempt by a want of physical strength for the purpose. The case of individuals expatriating themselves, that is leaving their country in its *territorial* as well as its social & political sense, may well be deemed a reasonable privilege, or rather as a right impliedly reserved. And even in this case equitable conditions have been annexed to the right which qualify the exercise of it.

Applying a like view of the subject to the case of the U. S. it results, that the compact being among individuals as imbodyed into States, no State can at pleasure release itself therefrom, and set up for itself. The compact can only be dissolved by the consent of the other parties, or by usurpations or abuses of power justly having that effect. It will hardly be contended that there is anything in the terms or nature of the compact, authorizing a party to dissolve it at pleasure.

It is indeed inseparable from the nature of a compact, that there is as much right on one side to expound it & to insist on its fulfilment according to that exposition, as there is on the other so to expound it as to furnish a release from it; and that an attempt to annul it by one of the parties, may present to the other, an option of acquiescing in the annulment, or of preventing it as the one or the other course may be deemed the lesser evil. This is a consideration which ought deeply to impress itself on every patriotic mind, as the strongest dissuasion from unnecessary approaches to such a crisis. What would be the condition of the States attached to the Union & its Govt. and regarding both as essential to their well-being, if a State placed in the midst of them were to renounce its Federal obligations,

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and erect itself into an independent and alien nation? Could the States N. & S. of Virginia, Pennsyla. or N. York, or of some other States however small, remain associated and enjoy their present happiness, if geographically politically and practically thrown apart by such a breach in the chain which unites their interests and binds them together as neighbours & fellow citizens. It could not be. The innovation would be fatal to the Federal Governnt. fatal to the Union, and fatal to the hopes of liberty and humanity; and presents a catastrophe at which all ought to shudder.

Without identifying the case of the U. S. with that of individual States, there is at least an instructive analogy between them. What would be the condition of the State of N. Y. of Massts. or of Pena. for example, if portions containing their great commercial cities, invoking original rights as paramount to social & constitutional compacts, should erect themselves into distinct & absolute sovereignties? In so doing they would do no more, unless justified by an intolerable oppression, than would be done by an individual State as a portion of the Union, in separating itself, without a like cause, from the other portions. Nor would greater evils be inflicted by such a mutilation of a State of some of its parts, than might be felt by some of the States from a separation of its neighbours into absolute and alien sovereignties.

Even in the case of a mere League between nations absolutely independent of each other, neither party has a right to dissolve it at pleasure; each having an equal right to expound its obligations, and neither, consequently a greater right to pronounce the compact void than the other has to insist on the mutual execution of it. [See, in Mr. Jefferson's volumes, his letters to J. M. Mr. Monroe & Col. Carrington]

Having suffered my pen to take this ramble over a subject engaging so much of your attention, I will not withhold the notes made by it from your persual. But being aware that without more development & precision, they may in some instances be liable to misapprehension or misconstruction, I will ask the favour of you to return the letter after it has passed under your partial & confidential eye.

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I have made no secret of my surprize and sorrow at the proceedings in S. Carolina, which are understood to assert a right to annul the Acts of Congress within the State, & even to secede from the Union itself. But I am unwilling to enter the political field with the “telum imbelles” which alone I could wield. The task of combating such unhappy aberrations belongs to other hands. A man whose years have but reached the canonical three-score-&-ten (and mine are much beyond the number) should distrust himself, whether distrusted by his friends or not, and should never forget that his arguments, whatever they may be will be answered by allusions to the date of his birth.

With affect. respects,

In all the views that may be taken of questions between the State Govts. & the Genl. Govt. the awful consequences of a final rupture & dissolution of the Union shd. never for a moment be lost sight of. Such a prospect must be deprecated, must be shuddered at by every friend to his country, to liberty, to the happiness of man. For, in the event of a dissolution of the Union, an impossibility of ever renewing it is brought home to every mind by the difficulties encountered in establishing it. The propensity of all communities to divide when not pressed into a unity by external danger, is a truth well understood. *There is no instance of a people inhabiting even a small island, if remote from foreign danger, and sometimes in spite of that pressure, who are not divided into alien, rival, hostile tribes.* The happy Union of these States is a wonder; their Constn. a miracle; their example the hope of Liberty throughout the world. Woe to the ambition that would meditate the destruction of either!